HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 689 Voting Methods
SPONSOR(S): Oversight, Transparency & Public Management Subcommittee; Fitzenhagen; Ponder and others
TIED BILLS: **IDEN./SIM. BILLS:** CS/CS/SB 268

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Oversight, Transparency & Public Management Subcommittee	12 Y, 0 N, As CS	Toliver	Harrington
2) Public Integrity & Ethics Committee	16 Y, 0 N	Poreda	Rubottom
3) State Affairs Committee	20 Y, 0 N	Toliver	Williamson

SUMMARY ANALYSIS

Current law requires all voting by electors without disabilities to be done by marksense ballots (paper ballots) using a marking device. However, electors with disabilities may vote using touchscreen voting equipment, called "voter interface devices," that meet the accessibility requirements listed in state and federal law. A voter interface device must be certified by the Department of State (DOS) to meet certain minimum standards of accessibility. At least one voter interface device certified for use by persons with disabilities must be available at each polling place. DOS-certified voter interface devices may mark a paper marksense ballot, produce a paper output, or tabulate the votes cast directly from touchscreen choices made by the elector. By 2020, however, each voter interface device must be able to mark a paper marksense ballot in order to be in compliance with state law.

The bill requires all voting either be via paper marksense ballot <u>or</u> via voter interface device that meets state and federal standards for accessibility and produces a voter-verifiable paper output. The bill would allow any eligible elector to use either method to vote, eliminating the current requirement that voter interface devices be used only by individuals with a disability. The bill prohibits voter interface devices from being used to tabulate votes and requires that all vote tabulation be based on a subsequent scan of the marksense ballot or the voter-verifiable paper output after the voter interface device process has been completed. Lastly, the bill prohibits DOS from promulgating a rule allowing the use of any electronic or electromechanical reading device to review certain hybrid voting style ballots produced by a voter interface device to discern voter intent, unless the printed text is illegible.

The bill will likely have a negative fiscal impact on local governments that do not possess voter interface devices that produce a voter-verifiable paper output. *See* Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Help America Vote Act
In 2002, the U.S. Congress passed the Help America Vote Act of 2002 (HAVA), one of the primary goals of which was to "establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections."[1] HAVA requires voting systems[2] used in federal elections to meet certain specifications.[3] Among those specifications are requirements regarding the accessibility of the voting system to individuals with disabilities.[4] The voting system, or direct recording electronic voting system, must be accessible for individuals with disabilities, and must include nonvisual accessibility for the blind and visually impaired in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters. In addition, there must be at least one voting system equipped for individuals with disabilities at each polling place.[5]

HAVA specifies that any direct recording electronic voting system equipped for use by individuals with disabilities must:
- Permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;
- Provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and
- Notify the voter if the voter selects more than one candidate for a single office, explain the effect of casting multiple votes for the office, and provide the voter with the opportunity to correct the ballot before the ballot is cast.[6]

Department of State
The Department of State (DOS)[7] is headed by the Secretary of State (Secretary)[8] who serves as Florida's chief election officer.[9] In his or her capacity as chief election officer, the Secretary is charged with a variety of responsibilities, including obtaining and maintaining uniformity in the interpretation and implementation of the election laws; providing uniform standards for the proper and equitable implementation of the registration laws; providing technical assistance to the supervisors of elections (supervisors) on voter education, election personnel training services, and voting systems; and creating

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[1] Help America Vote Act of 2002, P.L. 107-252 (2002).
[2] HAVA defines "voting system" to mean the total combination of mechanical, electromechanical, or electronic equipment…that is used to define ballots; cast and count votes; report or display election results; maintain and produce any audit trail information; and the practices and associated documentation used to identify system components and versions of such components; test the system during its development and maintenance; maintain records of system errors and defects; determine specific system changes to be made to a system after the initial qualification of the system; and to make available any materials to the voter (such as notices, instructions, forms, or paper ballots). 52 U.S.C. s. 21081(b).
[3] 52 U.S.C. s. 21081(a).
[4] 52 U.S.C. s. 21081(a)(3).
[5] *Id.*
[6] 52 U.S.C. s. 21081(a)(1).
[7] Section 20.10(1), F.S.
[8] *Id.*
[9] Section 97.012, F.S. The National Voter Registration Act of 1993 requires each state to designate a chief state election official to coordinate the state responsibilities under the act. 52 U.S.C. s. 20509. HAVA incorporated the term "chief state election official" and, among other duties, required that official to implement and maintain a statewide voter registration system. 52 U.S.C. s. 21083(a)(1)(A).

and administering a statewide voter registration system as required by HAVA.[10] The Division of Elections (Division)[11] within DOS provides administrative support to the Secretary[12] to ensure that Florida has fair and accurate elections.[13]

Recounts
The preliminary results of an extremely close election may warrant a statutory machine and/or manual recount, depending on the margin of victory. The recount occurs before the election results are certified. The purpose of the recount is to determine who won an election. The State Elections Canvassing Commission, in the case of federal, state, and multicounty races, and the local county canvassing board in most other elections, must certify the results by the ninth day after a primary election and the 14th day after a general election.[14]

Machine Recounts
If the first set of unofficial results[15] indicate that the margin of victory in any race is one-half of one percent or less, each canvassing board must run the marksense ballots through the voting system's automatic tabulating equipment for every affected precinct.[16] During this machine recount process, the tabulators sort out the overvotes and undervotes, in the event the results are close enough to warrant a manual recount of overvotes and undervotes. Touchscreen ballots for disabled voters are recounted by examining and reconciling discrepancies in the precinct tabulator counters.

Manual Recounts
If the machine recount results comprising the second set of unofficial results[17] indicate a margin of victory of one-quarter of one percent or less, the county canvassing board must conduct a manual recount of the overvotes and undervotes.[18] Section 102.166(4)(b), F.S., requires DOS to adopt rules for the federal write-in absentee ballot and for each certified voting system prescribing what constitutes a "clear indication on the ballot that the voter has made a definite choice." DOS, in response to the requirement, promulgated Rule 1S-2.207, F.A.C., entitled Standards for Determining Voter's Choice on Ballot. The majority of the manual recount process involves teams of two electors (preferably from opposing parties) reviewing marksense paper ballots to determine whether there is a "clear indication on the ballot that the voter has made a definite choice."[19] If a team cannot agree, the ballot is presented to the canvassing board for a final determination.[20]

Voter Interface Devices
Current law requires all electors without disabilities to vote by marksense ballots[21] that can be electronically tabulated.[22] However, electors with disabilities may vote using touchscreen voting

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[10] *Id.*

[11] Section 20.10(2)(a), F.S.

[12] Section 20.10(1), F.S. The Secretary is appointed by the Governor, subject to confirmation by the Senate, and serves at the pleasure of the Governor. The Secretary performs the functions conferred by the State Constitution upon the custodian of state records.

[13] About Us, DIVISION OF ELECTIONS, *available at* https://dos.myflorida.com/elections/about-us/ (last visited on March 8, 2019).

[14] Section 102.111(2), F.S. County canvassing boards must submit final returns to DOS for races certified by the Elections Canvassing Commission no later than 5:00 p.m. on the seventh day after a primary election and by noon on the 12th day after a general election. Section 102.112(1)-(2), F.S.

[15] County canvassing boards must report the first set of unofficial results in federal, statewide, state or multicounty office or ballot measure to DOS by noon of the third day after a primary election and noon of the fourth day after a general election. Section 102.141(5), F.S.

[16] Section 102.141(7), F.S.

[17] County canvassing boards must report the second set of unofficial results in federal, statewide, state or multicounty office or ballot measure to DOS by 3:00 p.m. of the fifth day after a primary election and 3:00 p.m. of the ninth day after a general election. Section 102.141(7)(c), F.S.

[18] Section 102.166(1), F.S.

[19] Section 102.166(4)(b), F.S.; *see also* R. 1S-2.027, F.A.C.

[20] Section 102.166(5)(c), F.S.

[21] The term "marksense ballot" is defined to mean a printed sheet of paper, used in conjunction with an electronic or electromechanical vote tabulation voting system, containing the names of candidates, or a statement of proposed constitutional

equipment, called "voter interface devices," that meet the requirements listed in HAVA and specified state accessibility requirements; only voters with disabilities may cast ballots on these voting devices.[23] A "voter interface device" is any device that communicates voting instructions and ballot information to a voter and allows the voter to select and vote for candidates and issues.[24] To be available for use by those with disabilities, the voter interface device must be certified by DOS to meet certain minimum standards of accessibility.[25] At least one voter interface device certified for use by persons with disabilities must be available at each polling place.[26]

A voter interface device may mark a marksense ballot, produce a paper output, or tabulate the votes cast directly from touchscreen choices made by the elector.[27] By 2020, however, each voter interface device must be able to mark a paper marksense ballot in order to be in compliance with state law.[28] In regards to this deadline, the Legislature has delayed implementation (to 2012,[29] 2016,[30] and lastly to the current deadline in 2020[31]), to allow election technology to catch up with the requirement that voters with disabilities be able to cast an independent ballot that is:
- Recorded on paper for canvassing and recount purposes; and
- Cast in the same manner as voters without disabilities.

Currently, there are three DOS-certified systems for voters with disabilities:
- ES&S AutoMARK (22 counties);[32]
- Dominion ImageCast Evolution (16 counties);[33] and
- ES&S ExpressVote (25 counties).[34]

Generally, these systems "mark" a scannable paper ballot that can be used for canvassing and recount purposes.[35] AutoMARK and ImageCast Evolution produce the familiar optical-scan ballot style; ExpressVote produces a ballot card with multiple bar codes at the top corresponding to the voters' choices. Underneath the bar codes, the card contains the offices or amendments on the ballot, along with the voters' choices in each contest.

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amendments or other questions or propositions submitted to the electorate at any election, on which sheet of paper an elector casts his or her vote. Section 97.021(5)(a), F.S.

[22] Section 101.56075(1), F.S.

[23] Section 101.56075(2), F.S.

[24] Section 97.021(42), F.S.

[25] Section 101.56062, F.S.

[26] Section 101.56062(2), F.S.; s. 97.021(27), F.S., defines the term "polling place" to mean the building that contains the polling room where ballots are cast.

[27] Section 101.56075(2), F.S.

[28] Section 101.56075(3), F.S.

[29] Chapter 2007-30, s. 6, L.O.F.. (codified at s. 101.56075(3), F.S. [2007]).

[30] Chapter 2010-167, s. 5, L.O.F. (codified at s. 101.56075(3), F.S.[2010]).

[31] Chapter 2013-57, s. 9, L.O.F.. (codified at s. 101.56075(3), F.S. [current]).

[32] This system marks the same type of optical scan ballot design familiar to voters, effectively serving as an electronic "pen." *See* VERIFIED VOTING, ES&S AutoMARK Description and Instructional Video, *available at* https://www.verifiedvoting.org/resources/voting-equipment/ess/automark/ (last visited on March 8, 2019).

[33] ImageCast Evolution is a second-generation system similar to AutoMARK in that it marks a typical optical scan ballot using the voter's electronic selections. Evolution goes a step further, however, by *automatically* forwarding the marked ballot into the tabulator — especially helpful for voters with certain physical limitations. *See* DOMINION VOTING, ImageCast Evolution, *available at* https://www.dominionvoting.com/products (last visited on March 8, 2019).

[34] The ExpressVote produces a ballot card with multiple bar codes at the top corresponding to the voter's choices. Underneath the bar codes, the card contains the offices or amendments on the ballot, along with the voter's choice in each contest. *See* VERIFIED VOTING, ES&S ExpressVote Description and Instructional Video, *available at* https://www.verifiedvoting.org/resources/voting-equipment/ess/expressvote/ (last visited on March 8, 2019).

[35] About two-thirds of Florida's counties (47/67) currently use either the ES&S AutoMARK or ExpressVote systems for disabled voters. *See* DIVISION OF ELECTIONS, *2019 Voting Systems* (Feb. 25, 2019 update), *available at* https://dos.myflorida.com/media/695246/voting-systems-in-use-by-county.pdf (last visited on March 8, 2019).

These systems prevent an elector from "overvoting" (selecting more than one candidate per race) and warn or prompt the voter if he or she "undervotes" (completely skips a race) but allows an "undervote" after confirming the voter's intent. There is a summary review screen at the end of the selection process to allow a voter to go back and make or change a selection.[36] After the ballot is printed on an AutoMARK or ExpressVote system, voters are able to review the ballot for accuracy before depositing it themselves in an optical scanner; the ImageCast Evolution system automatically deposits the optical-scan ballot into the ballot box for the voter.

Effect of the Bill

The bill requires that all voting either be via paper marksense ballot or via a voter interface device that meets state and federal standards for accessibility and produces a voter-verifiable paper output. The bill would allow any eligible elector to use either method to vote, eliminating the current requirement that voter interface devices be used only by individuals with a disability. Four counties — Glades, Jefferson, Miami-Dade,[37] and Palm Beach[38] — are still using voter interface devices that do not produce a paper output.[39] The remaining 63 counties have purchased touchscreen equipment for voters with disabilities that produces a scannable paper output, though the printed ballot/ballot card varies in format.[40]

The bill prohibits voter interface devices from being used to tabulate votes and requires that all vote tabulation be based on a subsequent scan of the marksense ballot or the voter-verifiable paper output after the voter interface device process has been completed.

Lastly, the bill prohibits DOS from promulgating a rule allowing the use of any electronic or electromechanical reading device to review certain hybrid voting style ballots produced by a voter interface device to discern voter intent, unless the printed text is illegible.

B. SECTION DIRECTORY:

Section 1 amends s. 97.021, F.S., relating to definitions.

Section 2 amends s. 101.56075, F.S., relating to voting methods.

Section 3 amends s. 102.166, F.S., relating to manual recounts of overvotes and undervotes.

Section 4 provides an effective date of January 1, 2020.

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[36] Voters can return to a contest selection *for any reason*, not just because they left a race blank, or undervoted, and change a selection.

[37] In December 2017, the Miami-Dade County Board of County Commissioners, noting that they would have buy new machines to meet the 2020 deadline, voted to extend the support contract for their current machines and allow the county Elections Department to evaluate available technology that complies with the law prior to the deadline. Thereafter, a recommendation would be presented to the board. MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS, Legislative Item, File Number: 172341, December 5, 2017, *available at* http://www.miamidade.gov/govaction/matter.asp?matter=172341&file=true&fileAnalysis=false&yearFolder=Y2017 (last visited March 8, 2019).

[38] In February 2019, the Palm Beach County Board of County Commissioners voted to appropriate $15,682,546.70 to purchase new voting equipment, to include at least 525 ExpressVote terminals. PALM BEACH COUNTY BOARD OF COUNTY COMMISSIONERS, BCC Brief, February 5, 2019, *available at* http://discover.pbcgov.org/Lists/Newsroom/NewsDispForm.aspx?ID=1890&RootFolder=%2FLists%2FNewsroom&Source=http%3A%2F%2Fdiscover%2Epbcgov%2Eorg%2Fcountycommissioners%2FPages%2FBriefs%2Easpx (last visited March 8, 2019).

[39] *See* DIVISION OF ELECTIONS, *2019 Voting Systems* (Feb. 25, 2019 update), *available at* https://dos.myflorida.com/media/695246/voting-systems-in-use-by-county.pdf (last visited on March 8, 2019).

[40] *Id.*

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a positive fiscal impact on vendors in the private sector that produce voter interface devices meeting the requirements of the bill.

D. FISCAL COMMENTS:

The bill will have a negative fiscal impact on those four counties that do not currently own voting interface devices that either mark a marksense ballot or produce voter-verifiable paper outputs.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill appears to be exempt from the requirements of Art. VII, s. 18 of the Florida Constitution because it is a law concerning elections.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not define the term "voter-verifiable paper output," and, therefore, could lead to differing interpretations as to the meaning of that term.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2019, the Oversight, Transparency & Public Management Subcommittee approved a strike-all amendment and reported the bill favorably as a committee substitute. The strike-all amendment prohibits voter interface devices from being used to tabulate votes and requires that all vote tabulation must be based on a subsequent scan of the marksense ballot or the voter-verifiable paper output after the voter interface device process has been completed. In addition, the strike-all amendment prohibits DOS from

promulgating a rule allowing the use of any electronic or electromechanical reading device to review certain hybrid voting style ballots produced by a voter interface device to discern voter intent, unless the printed text is illegible.

This analysis is drafted to the committee substitute as approved by the Oversight, Transparency & Public Management Subcommittee.